Supreme Court, U.S.
FILED

94 403 SEP 2 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CHARLES T. PATTILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

E. G. "GERRY" MORRIS
Counsel of Record

MORRIS & FLOREY, L.L.P.
704 West 9th Street
Austin, Texas 78701
512/479-8600
512/479-6035 (Fax)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER IN ACCORDANCE WITH *WILLIAMS V. UNITED STATES*, AN APPELLATE COURT, IN ORDER TO UPHOLD A SENTENCE BASED ON AN ERRONEOUS APPLICATION OF THE SENTENCING GUIDELINES, MUST FIND EVIDENCE IN THE RECORD TO INDICATE THAT THE TRIAL COURT WOULD HAVE RENDERED THE SAME SENTENCE ABSENT AN ERRONEOUS APPLICATION OF THE SENTENCING GUIDELINES WHERE THE TRIAL COURT COULD HAVE RENDERED THE SAME SENTENCE IF IT HAD CORRECTLY APPLIED THE SENTENCING GUIDELINES AND DEPARTED DOWNWARD FEWER LEVELS.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

REASON FOR GRANTING THE PETITION 9

THE OPINION BELOW CONFLICTS WITH THIS COURT'S HOLDING IN *WILLIAMS V. UNITED STATES* BY FAILING TO FIRST CONSIDER WHETHER THERE HAS BEEN AN ERRONEOUS APPLICATION OF THE SENTENCING GUIDELINES, AND, IF SO, THEN DETERMINING WHETHER THE TRIAL COURT WOULD HAVE RENDERED THE SAME SENTENCE ABSENT THE ERROR 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990) 7

United States v. Johnson, 971 F.2d 562 (10th Cir. 1992) 7

United States v. Mir, 919 F.2d 940 (5th Cir. 1990) 7

United States v. Mourning, 914 F.2d 699 (5th Cir. 1990) 7

United States v. Taylor, 984 F.2d 298 (9th Cir. 1993) 7

Williams v. United States, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1192) 8, 11

STATUTES:

18 U.S.C. § 371 2

18 U.S.C. § 1344 2

18 U.S.C. § 1956(a)(3) 2

18 U.S.C. § 3231 (1994) 1

18 U.S.C. § 3742(a)(2) 8, 10, 11

18 U.S.C. § 3742(f)(1) 1, 11

28 U.S.C. § 1291 (1994) 1

28 U.S.C. § 1254(1) (1994) 1

Rule 32(c), F.R.Cr.P. 3

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES SENTENCING GUIDELINE PROVISIONS:

U.S.S.G. § 1B1.1 (1993) 9, 10

U.S.S.G. § 2F1.1 (1993) 5

U.S.S.G. § 2S1.1 (1993) 4, 5

U.S.S.G. § 3B1.1(a) (1993) 4, 6, 7

U.S.S.G. § 3D1.2(d) (1993) 4

U.S.S.G. § 3D1.3(a) (1993) 5

U.S.S.G. § 3D1.4 (1993) 5

U.S.S.G. § 3E1.1 (1993) 6

U.S.S.G. § 5K1.1 (1993) 6, 10

OPINIONS BELOW

An appeal was perfected by Petitioner from the trial court's judgment entered by the Honorable H. F. Garcia. A panel of the Court of Appeals for the Fifth Circuit affirmed the judgment in an unpublished opinion, No. 93-8505, on May 12, 1994. (Appendix A) Petitioner's timely Motion for Rehearing was denied by the Court on June 9, 1994, in an unpublished opinion. (Appendix B).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction to hear Petitioner's appeal under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The date of entry of the decision sought to be reviewed, the opinion of the Court of Appeals, Fifth Circuit, was May 12, 1994. Petitioner filed a timely Motion for Rehearing which was denied on June 9, 1994. This Writ of Certiorari will be timely if filed on or before September 7, 1994.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3742 (1994).

Review of a sentence

(a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

* * *

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

* * *

(f) Decision and disposition. – If the court of appeals determines that the sentence –

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate; . . .

STATEMENT OF THE CASE

Petitioner was convicted upon his pleas of guilty to offenses charged in a two count information; count one alleging the offense of attempting to engage in the laundering of monetary instruments (18 U.S.C. 1956(a)(3)), and count two alleging conspiracy to commit bank fraud (18 U.S.C. 371 & 18 U.S.C. 1344).

The bank fraud conviction arose out of a scheme wherein Petitioner persuaded an acquaintance employed at a bank to convert checks drawn on the personal account of an associate to cashier's checks. The cashier's checks were then immediately negotiated by Petitioner and others. Petitioner knew that he did not have authority to negotiate the personal checks and that there were insufficient funds on deposit to cover them. The scheme resulted in the bank suffering a loss of $520,000.

The money laundering conviction arose out of a government sting operation. Petitioner approached several individuals and offered them the opportunity to launder money through a peso for dollars exchange scheme. Dollars and Mexican pesos were to be exchanged in large quantities with a small discount rate charged. Because of the volume of currency involved, there was supposed to be a substantial profit based on the discount rate. The scheme was supposed to involve smuggling currency in and out of the United States and Mexico by various methods and the use of offshore banking institutions to disguise the source and ownership of the currency.

One of those persons contacted concerning the scheme reported the activity to the authorities. A short time later, a special agent with United States Customs Service, acting in an undercover capacity, contacted Petitioner and expressed interest in investing cash in the operation. In a secretly filmed meeting, the undercover agent expressly told Petitioner that the funds he wanted to provide were the proceeds of illegal drug sales. Petitioner told the agent that he would take the money, even with this knowledge. The agent offered Petitioner the sum of $500,000 which he agreed to take at a later date. Shortly after this agreement was made, Petitioner was made aware by the government of the Customs agent's true identity and negotiations for a plea agreement began.

Pursuant to a plea agreement, Petitioner entered his pleas and provided assistance to the United States Government in the prosecution of others involved.

After his pleas of guilty a Presentence Report was prepared in accordance with Rule 32(c), F.R.Cr.P. The author of the Presentence Report grouped the money

laundering and bank fraud offenses, a procedure he believed to be dictated by U.S.S.G. § 3D1.2(d) (1993).[1] He aggregated the amounts involved in the two offenses and applied the guideline provision applicable to the money laundering offense U.S.S.G. § 2S1.1 (1993) to both offenses. Applying the aggregated amount as a specific offense characteristic under U.S.S.G. 2S1.1(b)(2) (1993), the writer added five levels to the calculation.

The writer of the presentence report also determined a four level upward adjustment under U.S.S.G. 3B1.1(a) (1993) for Petitioner's "role in the offense" to be appropriate concluding that Petitioner was an organizer in the bank fraud offense and member of an extensive organization in the peso scheme where he functioned as a conduit for funds.[2]

Petitioner objected to the grouping of the bank fraud and money laundering offenses and application of the aggregated amount involved in the two offenses to

---

[1] U.S.S.G. § 3D1.2(d) (1993) provides that where the offense level is "determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm," offenses should be grouped together as "closely related counts." However, this guideline says nothing about adding the total loss or harm from each count and applying the aggregate amount to the guideline for the offense which has the highest guideline range. This is what the writer of the PSR, and ultimately the trial court did.

[2] The Presentence Report stated, "The criminal conduct outlined in the offense conduct reflects an extensive organization involving several participants with the defendant functioning as the conduit for illegal monies in the peso scheme as well as organizer of the bank fraud. Therefore, according to 3B1.1 of the guideline, an increase of 4 levels is warranted."

U.S.S.G. § 2S1.1 (1993). He contended that each offense should be scored under its own appropriate guideline provision, U.S.S.G. § 2F1.1 (1993) for the bank fraud offense and U.S.S.G. § 2S1.1 (1993) for the money laundering offense. Further, the amount involved in each distinct offense should be applied to the guideline provisions for that offense to arrive at a base offense level for each. Then, the combined offense level should be determined under U.S.S.G. § 3D1.3(a) (1993) and § 3D1.4 (1993), with each offense being considered as a separate "group".[3] This procedure would have resulted in a two level decrease in Petitioner's total offense level.

The trial court overruled this objection and applied the procedure and reached the result set forth in the Presentence Report.

---

[3] As was argued in Appellant's written objections to the PSR and at the sentencing hearing, such a construction of the guidelines would lead to an absurd result. If a defendant were charged with a fraud offense only U.S.S.G. § 2F1.1 (1993) would determine the offense level. However, if the defendant were also charged with a violation of 18 U.S.C. 1956 (Laundering Monetary Instruments) even a small illegal transaction under that charge would suddenly convert the fraud offense into a much more serious offense because the offense level under the guideline applicable to money laundering offenses would be higher for the same or nearly the same amount of money involved. For instance, if a bank fraud involved a loss of $1,000,000, the offense level under U.S.S.G. § 2F1.1 (1993) would be 17. However, under the reasoning applied by the trial court, if the defendant were also convicted of laundering $1,000, the offense level would be transformed under U.S.S.G. § 2S1.1 (1993) to level 25. The money laundering offense, if charged alone, would yield an offense level of 20.

Petitioner further objected to the four level increase under U.S.S.G. § 3B1.1(a) (1993). He contended that where an accused is convicted of two distinct offenses, it is improper for the court to consider his role in one offense and the number of participants in the other and put these two factors together to justify an increase of four levels for the actor's role in the offense. The Government argued that the offenses were part of the same scheme and the cast of participants were not distinct to each offense but common to the overall course of conduct. If this objection had been sustained, the result would have been a four level decrease in Petitioner's total offense level. The trial court overruled the objection adopting the language in the Presentence Report.

The result of the trial court's ruling was that the total offense level for the two offenses of conviction was determined to be level 32. Petitioner received a three level decrease for acceptance of responsibility under U.S.S.G. § 3E1.1 (1993). The resulting total offense level before any downward departure was calculated to be twenty-nine.

The trial court also departed downward six levels pursuant to U.S.S.G. § 5K1.1 (1993), based on the Government's Motion requesting the departure and detailing Petitioner assistance in the prosecution of other individuals. Petitioner was sentenced to forty-six months incarceration, the least amount of time allowable under the guidelines for offense level twenty-three.

On appeal to the Fifth Circuit Court of Appeals, Petitioner maintained that the court has reached its determination of the applicable offense level before departure

based on an erroneous application of at least two provisions of the Sentencing Guidelines. He urged the Court to follow opinions directly on point from the Ninth and Tenth Circuit Court of Appeals which held aggregation of the monetary amounts involved in related money laundering and fraud offenses to be improper. See, *United States v. Taylor*, 984 F.2d 298 (9th Cir. 1993); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992). The issue was one of first impression in the Fifth Circuit Court of Appeals. Petitioner also urged that the consideration of factors from two offenses combined could not warrant an increase under U.S.S.G. 3B1.1(a) (1993), for Petitioner's role in the offense. Petitioner argued that the reasoning in prior Fifth Circuit Court of Appeals opinions supported his contention. See, *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990); *United States v. Mourning*, 914 F2d 699,705 (5th Cir. 1990); *United States v. Mir*, 919 F.2d 940, 943-946 (5th Cir. 1990). Petitioner contended that because of the misapplication of the sentencing guidelines the trial court arrived at the wrong "starting point" at which the downward departure was subtracted. He argued that the errors affected the sentence he received.

The opinion of the Fifth Circuit pointed out that if Petitioner were to succeed on all of his arguments the resulting offense level would be twenty-three. It concluded that since the court sentenced Petitioner within the range in offense level twenty-three, taking into account the downward departure, no harm resulted from any error that had occured. The Court reasoned that the trial court could simply decline to depart downward and sentence Petitioner to the same sentence. The opinion did not find that the sentencing court would likely assess the

same sentence on remand but merely observed that it could do so. The Fifth Circuit, thus, did not address the merits of Petitioner's contentions that the sentencing guidelines had been erroneously applied.

SUMMARY OF ARGUMENT

Certiorari should be granted because the opinion of the Court of Appeals contradicts a decision of this Court.

The Court of Appeals failed to apply the holding of this Court in *United States v. Williams*, 112 S.Ct. 1112 (1992), setting forth the standard and procedure of appellate review under 18 U.S.C. § 3742(a)(2) in instances where the defendant complains that the trial court erroneously applied provisions of the sentencing guidelines. The Court of Appeals should have first determined if there had been an incorrect application of the sentencing guidelines by the trial court which affected Petitioner's sentence. If it so found the Court of Appeals should have remanded the case to the trial court unless it concluded on the record as a whole that the trial court *would* have assessed the same sentence absent the error. Instead, the Court of Appeals did not examine the merits of Petitioner's contentions, but concluded that since the trial court *could* assess the same sentence on remand, any error was harmless.

Certiorari should be granted to correct this deviation for this Court's precedent.

REASON FOR GRANTING THE PETITION

THE OPINION BELOW CONFLICTS WITH THIS COURT'S HOLDING IN *WILLIAMS V. UNITED STATES* BY FAILING TO FIRST CONSIDER WHETHER THERE HAS BEEN AN ERRONEOUS APPLICATION OF THE SENTENCING GUIDELINES, AND, IF SO, THEN DETERMINING WHETHER THE TRIAL COURT WOULD HAVE RENDERED THE SAME SENTENCE ABSENT THE ERROR.

Petitioner raised issues in his appeal concerning the correctness of the trial court's application of the sentencing guidelines. If petitioner is correct in his complaints, the offense level determined by the trial court to be appropriate for the offenses of conviction would have been lower before considering the downward departure. Such an error would affect the sentence if the proper procedure under the sentencing guidelines was followed.

To determine the appropriate adjusted offense level taking into account all factors affecting the sentencing under the guidelines, the trial court should have, and by all indications did follow the procedure set forth in U.S.S.G. § 1B1.1 (1993). That provision sets out the order in which certain sentencing factors are to be considered. The trial court (1) determined the applicable offense guideline section for each offense; (§ 1B1.1(a)), (2) determined the base offense level for each and applied appropriate specific offense characteristics for each guideline; (§ 1B1.1(b)), (3) applied adjustments related to role of the offense; (§ 1B1.1(c)), (4) applied count grouping principles because there was more than one count of conviction; (§ 1B1.1(d)), (5) then adjusted the offense level for Petitioner's acceptance of responsibility; (§ 1B1.1(e)), and,

(6) after noting that Petitioner had no significant criminal history, determined the guideline range applicable to be offense level of twenty-nine. Then the trial court considered the Government's motion for downward departure in accordance with § 1B1.1(1). Based on the arguments of the Government and Petitioner concerning his assistance to the Government in the prosecution of others, the court departed downward six levels. (See, Appendix C). If the trial court's application of the guidelines was flawed in any of the above steps, an erroneously high "starting point" would have been established from which the court would have subtracted its downward departure. Since the downward departure was based on the nature and extent of Petitioner's cooperation with the government rather than other offense conduct or the overall sentence desired for the conduct, there is no reason to conclude that a lower "starting point" would necessarily result in a smaller downward departure.[4]

Review of a sentence on appeal by a Defendant is allowed where the contention is that the sentence was imposed as a result of an incorrect application of the sentencing guidelines. 18 U.S.C. § 3742(a)(2) (1994). Where the appellate court finds that the sentence was indeed imposed as a result of an incorrect application of

---

[4] Examining the factors set forth in U.S.S.G. § 5K1.1 (1993) for guiding the trial court's consideration of a downward departure based on substantial assistance to authorities, there is nothing in the language of that section or in the commentary that indicates that the court should determine the length of time of incarceration it believes appropriate and "work backwards" to determine what degree of downward departure would produce that sentence.

the sentencing guidelines, the case must be remanded to the trial court for further proceedings with appropriate instructions. 18 U.S.C. § 3742(f)(1) (1994).

The United States Supreme Court has considered the effect of Sections 3742(a)(2) and 3742(f)(1) in appeals where the contention is that the sentencing guidelines were incorrectly applied. This Court held that the party challenging the sentence on appeal bears the initial burden of showing that the district court relied upon an incorrect application of the guidelines at sentencing. However, once the court of appeals has so decided, remand is required unless the reviewing court is persuaded by the party defending the sentence, on the record as a whole, that the error did not affect the district court's decision to impose the sentence. *Williams v. United States*, 112 S.Ct. 1112, 1120-1121 (1992). The proper standard of analysis is whether the sentencing court *would* have imposed the same sentence absent the error in the application of the guidelines. *Williams v. United States*, 112 S.Ct. at 1120.

In this case the Fifth Circuit did not follow this court's decision in *Williams* and did not reach the contentions that the sentence was the result of an improper application of the sentencing guidelines because it concluded the trial court *could* decide on the same sentence upon remand. There was no analysis of the record to determine if the trial court *would* assess the same sentence upon remand.

This court's decision in *Williams* dictates that this case be remanded to the Fifth Circuit Court of Appeals for a determination of whether the sentence was the

result of an improper application of the sentencing guidelines. If the court determines that the sentence is based on an invalid factor, the case should be remanded to the trial court unless the record indicates that the trial court would have imposed the same sentence absent the error.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

E. G. "Gerry" Morris
Counsel of Record

Morris & Florey, L.L.P.
704 West 9th Street
Austin, Texas 78701
512/479-8600
512/479-6035 (Fax)

APPENDIX A

Opinion of the United States Court of Appeals Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8505

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES T. PATILLO

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(A-90-CR-43-A11)

(Filed May 12, 1944)

Before REAVLEY and EMILIO M. GARZA, Circuit Judges, and NOWLIN*, District Judge.

PER CURIAM:**

---

* District Judge of the Western District of Texas sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Charles T. Patillo was sentenced to concurrent terms of imprisonment of 46 months for money laundering and bank fraud. He confessed and pleaded guilty but complains of the sentence. His contention was that the calculation of total offense points, without downward departure, should have been 24. The court sentenced him to the lowest number of months for offense points of 23. If Patillo were to succeed on all of his arguments here, his total offense points would be 23. If we ordered resentencing, the district court could decline downward departure and resentence Patillo to 46 or more months of imprisonment. We find no error to justify further proceedings.

Specifically, we find no harm or effect of the government's "suggestion" of a 24 point calculation. The court could have found that at least four individuals under Patillo's organization and leadership (Mitchell, Garcia, Heinz and Wilshusen) participated in the bank fraud. Whether or not the amounts of money involved should be combined simply because of the nature of the two charges, all of the criminal conduct was simultaneous and continuing and with the same illegal purpose.

AFFIRMED.

APPENDIX B

Opinion of the United States Court of Appeals
Fifth Circuit
On Motion for Rehearing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8505

UNITED STATES OF AMERIC, [sic]

Plaintiff-Appellee,

versus

CHARLES T. PATILLO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(Filed June 9, 1994)

Before REAVLEY and EMILIO M. GARZA, Circuit Judges and NOWLIN,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

---

* District Judge of the Western District of Texas sitting by designation.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX C

Excerpt from the Trial Court's Judgment Containing the Statement of Reasons for the Final Guideline Range Within Which Petitioner was Sentenced

Defendant: CHARLES T. PATILLO
Case Number: A.90-CR-43 (1)

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	29
Criminal History Category:	I
Imprisonment Range:	87 months to 108 months
Supervised Release Range:	2 to 3 years
Fine Range:	$15,000. to $500,000.
Restitution:	$520,000.

The fine is waived because of the defendant's inability to pay.

The sentence departs from the guideline range upon motion of the government, as a result of defendant's substantial assistance.